SANITIZED DEC – DOCKET NO. 04-048 RSV – R MICHAEL REED – SUBMITTED – APRIL 30, 2004 – ISSUED – JUNE 4, 2004

SYNOPSIS

COAL SEVERANCE TAXES -- STATUTES UNCONSTITUTIONAL AS APPLIED TO FOREIGN EXPORTS -- Governed by the holding of the Supreme Court of the United States in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 91 L. Ed. 80, 67 S. Ct. 156 (1946), the West Virginia statutes imposing severance taxes on coal, including the additional tax on coal and the minimum severance tax on coal, W. Va. Code §§ 11-13A-3(a)-(b) [1997], 11-13A-6(a) [1997], and 11-12B-3(a) [2000], are unconstitutional, under the Federal Import-Export Clause, U.S. Const. art. I, § 10, cl. 2, as applied to coal severed and processed in this State and which immediately thereafter enters the "stream of export" to purchasers in foreign countries; these excise (business privilege) taxes, as applied in this context, constitute, "in *operation and effect*," "direct" "imposts" on *sales* of coal in foreign-export *transit*, which imposts are *per se* prohibited by the Federal Import-Export Clause as analyzed by *Richfield Oil*, regardless of the fact that outgoing transportation costs are excluded explicitly by legislative regulation (and implicitly by statute) from the "gross value" of the coal for coal severance tax purposes.

COAL SEVERANCE TAXES -- OTA MUST FOLLOW UNITED STATES SUPREME COURT PRECEDENT(S) NOT EXPLICITLY OVERRULED -- The West Virginia Office of Tax Appeals -- and all other tribunals, judicial and quasi-judicial -- must follow precedent(s) of the Supreme Court of the United States that may appear to be no longer valid but which are not explicitly overruled by that Court, such as *Richfield Oil Corp. v. State Board of Equalization*, 320 U.S. 69, 91 L. Ed. 80, 67 S. Ct. 156 (1946), *see United States v. International Business Machines Corp.*, 517 U.S. 843, 862, 135 L. Ed. 2d 124, 140, 116 S. Ct. 1793, 1804 (1996) (Thomas, J., writing for 6-2 majority) (dictum, that, under the Federal Import-Export Clause, "[t]he Court has never upheld a state tax assessed directly on goods in import or export transit[,]" despite a different, more lenient type of analysis in more recent Import-Export Clause decisions of the highest Court; *IBM* is a Federal Export Clause case, U.S. Const. art. I, § 9, cl. 5, which imposes a broader prohibition against the Federal Congress than the Federal Import-Export Clause, U.S. Const. art. I, § 10, cl. 2, imposes against the states). *Agostini v. Felton*, 521 U.S. 203, 237, 138 L. Ed. 2d 391, 423, 117 S. Ct. 1997, 2017 (1997) ("[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower tribunals] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

FINAL DECISION

Pursuant to the provisions of W. Va. Code §§ 11-10-14(c) & (*l*)(1) , as amended, the Petitioner timely filed amended severance tax returns claiming refunds, respectively, for the calendar year 2000 for the calendar year 2001, both for coal severance taxes.[1] The purpose of the amendment to each year's return was to delete all sales in continuous transit to the ultimate customers in foreign countries.

The Sales Tax Unit of the Internal Auditing Division of the West Virginia State Tax Commissioner's Office, by letter dated December 11, 2003, denied the entire amount of these two refund claims. The reason stated for the total denial of these claims was, essentially, that the Commissioner lacked the authority to declare a state tax statute to be unconstitutional, as requested by the Petitioner for coal sales to customers in foreign countries. This Petitioner received the refund claim denial letter on a date not set forth in the record.

Thereafter, by mail postmarked January 30, 2004, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for refund of coal severance taxes for both years (2000 and 2001). *See* W. Va. Code § 11-10A-8(2) [2002].

Subsequently, notice of a prehearing conference and of an evidentiary hearing on the petitions was sent to the Petitioner and to the Commissioner. At the prehearing conference the parties agreed to waive the right to the evidentiary hearing and, in lieu

[1] In this matter the term "coal severance taxes" refers to the basic coal severance tax, the "additional tax on coal," and the "minimum tax" on severed coal. *See* W. Va. Code §§ 11-13A-1 *et seq.*, as amended, called the "Severance and Business Privilege Tax Act of 1993," especially §§ 11-13A-3(a)-(b) [1997] (imposing basic severance tax on coal) and § 11-13A-6(a) [1997] (imposing additional severance tax on coal), and W. Va. Code § 11-12B-1 *et seq.,* as amended, especially § 11-12B-3(a) [2000] (imposing minimum severance tax on coal).

thereof, to submit this matter for decision on stipulations. The gravamen of the subsequently submitted stipulations was that this matter is identical to a prior-period (the years 1998 and 1999) matter involving this taxpayer, Docket Nos. 02-415 RSV and 02-416 RSV, and that the same evidence (evidentiary hearing held on October 30, 2002) and legal arguments presented in that matter would govern here, too.

FINDINGS OF FACT

The parties agree as to the material facts in this matter. They may be stated as follows.

1. During the tax refund periods in question, the Petitioner severed, processed, and sold coal from underground and surface mines located in West Virginia. After mining and any processing, the coal was stockpiled at the mine or at a nearby central loading site.

2. Immediately upon removal from the stockpiles, all of the coal sales at issue were to customers who, in turn, immediately sold and placed the coal in continuous transit, first by railway, and subsequently by cargo ships from loading facilities bordering another state, for shipment, usually within 72 hours, to the ultimate customers located in foreign countries.

CONCLUSIONS OF LAW

1. Under the applicable statutes, *see, e.g.,* W. Va. Code § 11-13A-3(a)-(b) [1997] (excise tax imposed "upon . . . exercising the privilege of engaging or continuing within this state in the business of severing, extracting, reducing to possession and producing for sale, … [5%] of the gross value of the natural resource produced . . ., as shown by the gross income derived by the sale"), liability for the coal severance taxes accrued in this matter at the time of sale, which is after the coal had entered the continuous stream of export to foreign customers.

2. Governed by the holding of the Supreme Court of the United States in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 91 L. Ed. 80, 67 S. Ct. 156 (1946), the West Virginia statutes imposing severance taxes on coal, including the additional tax on coal and the minimum severance tax on coal, W. Va. Code §§ 11-13A-3(a)-(b) [1997], 11-13A-6(a) [1997], and 11-12B-3(a) [2000], are unconstitutional, under the Federal Import-Export Clause, U.S. Const. art. I, § 10, cl. 2, as applied to coal, as here, severed and processed in this State and which immediately thereafter enters the "stream of export" to purchasers in foreign countries; these excise (business privilege) taxes, as applied in this context, constitute, "in *operation and effect*," "direct" "imposts" on *sales* of coal in foreign-export *transit*, which imposts are *per se* prohibited by the Federal Import-Export Clause as analyzed by *Richfield Oil*, regardless of the fact that outgoing transportation costs are excluded explicitly by legislative regulation (and implicitly by statute) from the "gross value" of the coal for coal severance tax purposes.

3. The West Virginia Office of Tax Appeals -- and all other tribunals, judicial and quasi-judicial -- must follow precedent(s) of the Supreme Court of the United States

that may appear to be no longer valid but which are not explicitly overruled by that Court, such as *Richfield Oil Corp. v. State Board of Equalization*, 320 U.S. 69, 91 L. Ed. 80, 67 S. Ct. 156 (1946), *see United States v. International Business Machines Corp.*, 517 U.S. 843, 862, 135 L. Ed. 2d 124, 140, 116 S. Ct. 1793, 1804 (1996) (Thomas, J., writing for 6-2 majority) (dictum, that, under the Federal Import-Export Clause, "[t]he Court has never upheld a state tax assessed directly on goods in import or export transit[,]" despite a different, more lenient type of analysis in more recent Import-Export Clause decisions of the highest Court; *IBM* is a Federal Export Clause case, U.S. Const. art. I, § 9, cl. 5, which imposes a broader prohibition against the Federal Congress than the Federal Import-Export Clause, U.S. Const. art. I, § 10, cl. 2, imposes against the states). *Agostini v. Felton*, 521 U.S. 203, 237, 138 L. Ed. 2d 391, 423, 117 S. Ct. 1997, 2017 (1997) ("[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower tribunals] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").[2]

4. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon a petitioner-taxpayer to show that it is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

[2] This tribunal is aware of the recent ruling, issued on May 27, 2004, by Judge Kaufman of the Circuit Court of Kanawha County, West Virginia, in *U.S. Steel Mining Co. v. Craig,* Civil Action No. 03-AA-74, involving this identical issue. Judge Kaufman in essence held that *Richfield Oil* had been overruled, implicitly, by later precedents of the Supreme Court of the United States. This tribunal concludes, however, that the above-quoted teaching of *Agostini* and similar precedents require all lower tribunals to "let" the Supreme Court of the United States explicitly overrule its own precedents and, until that time, to apply existing precedents of that Court. Similarly, the dicta of the High Court in *IBM, supra*, is binding on all lower tribunals until the High Court explicitly overrules the same. Stated another way, it is not proper for any lower tribunal to anticipate an explicit overruling of precedent by the High Court, no matter how clear it may appear that such overruling will occur sometime.

5. In light of conclusions of law nos. 1, 2, and 3, the Petitioners-taxpayers in this matter have carried the burden of proof concerning entitlement to the requested tax refunds.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the petition for refund of coal severance taxes for the years 2000 and 2001, combined, is hereby **AUTHORIZED** *in toto*.

As set forth in W. Va. Code § 11-10A-18 [2002], the West Virginia State Tax Commissioner's Office is to see that the payment of these refunds, including any statutory interest that may accrue, is issued promptly.